Supreme Court, U.S.
FILED
APR 11 2003
OFFICE OF THE CLERK

No. 02-1327

IN THE

Supreme Court of the United States

PIRELLI ARMSTRONG TIRE CORPORATION,

Petitioner,

v.

CLAY K. JAMES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

HUGH C. HOWSER, JR.
Counsel of Record
KARA E. SHEA
MILLER & MARTIN LLP
Attorneys for Respondents
1200 Nashville Place
150 Fourth Avenue North
Nashville, TN 37219
(615) 244-9270

180232

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Preliminary Statement 1

Response to Petitioner's Statement of the Case ... 2

Reasons for Denying the Petition 5

I. Petitioner Has Merely Alleged Erroneous Findings Of Fact By the Sixth Circuit 5

II. The Sixth Circuit's Decision is Based Upon the Unique Facts and Circumstances of This Case And Is Not in Conflict With The Decisions of Other Courts of Appeal On The Issue Presented 6

A. The Sixth Circuit's Decision Is Fact-Specific 7

B. The Decision Presented For Review is In Accord with Sixth Circuit Precedent 8

C. The Sixth Circuit's Decision is Not in Conflict With The Decisions of Other Courts of Appeals 10

Contents

Page

D. The Sixth Circuit's Decision Is Based On Well-Established Principles of Fiduciary Duty 12

III. Petitioner Alleges That The Sixth Circuit Misapplied A Properly Stated Rule Of Law 14

IV. The Sixth Circuit's Decision Does Not Undermine Congressional Policies Regarding ERISA 14

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Frahm v. Equitable Life Assurance Soc. Of United States, 137 F.3d 955 (7th Cir. 1998) 10

In re Unisys Corp. Retiree Med. Benefit "ERISA" Litigation, 57 F.3d 1255 (3rd Cir. 1995) 13, 15

Krohn v. Huron Memorial Hospital, 173 F.3d 542 (6th Cir. 1999) 7

Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir. 1998) 8, 9, 10, 13

Varity Corp. v. Howe, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996) 6

Wilson v. Southwestern Bell Tel. Comp., 55 F.3d 388 (8th Cir. 1995) 11

Statute:

29 U.S.C. § 1104 14

PRELIMINARY STATEMENT

Petitioner mischaracterizes the question presented in this case. This case does not address the ramifications of an employer's accurate representation about current ERISA plan benefits, followed by an unforeseen change in the plan. Rather, this case addresses *inaccurate* representations by a fiduciary to plan participants regarding the possibility of future changes in the plan. Contrary to Petitioner's assertions, the decision at issue neither expressly nor implicitly requires an employer to constantly remind plan participants of its right to alter benefits. Rather, the Sixth Circuit simply found that, based upon the particular facts and circumstances of this case, and pursuant to universally recognized principles articulated by this Court and prior Sixth Circuit decisions, Pirelli's representations to Respondents were inaccurate, misleading, and constituted a breach of fiduciary duty. In this respect, the decision imposes no additional obligations upon employers, but rather is in accord with existing law on this issue.

There are no compelling reasons to grant review on a writ of certiorari in this matter. In reaching the conclusion that Pirelli violated its fiduciary obligations to Respondents, the Sixth Circuit engaged in a careful and thoughtful comparative analysis of its prior decisions, as well as the decisions of this Court and other circuits addressing the parameters of a plan administrator's fiduciary duty under ERISA. The Sixth Circuit expressed no intention to depart from its own precedents or that of its sister circuits on this issue, nor does its holding have such an effect. The facts of this case are easily distinguishable from the cases which Petitioner claims represent "the other side" of this issue. There is no conflict. Moreover, any review of this case would

require this Court to second-guess the Sixth Circuit's factual conclusions and application of properly stated rules of law to these conclusions. As such, this case is not appropriate for review by this Court, and the petition for a writ of certiorari should be denied.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Petitioner presents a heavily edited version of the material facts in this matter, addressing the communications at issue simply by stating that Pirelli's representatives "accurately" told Respondents that their health benefits would continue "for life", and in doing so did not repeat the reservation of rights in the SPD. Pet. 5.[1] This is a gross oversimplification of the factual record before both the district court and the Sixth Circuit. Petitioner fails to acknowledge the undisputed evidence demonstrating Pirelli created a situation where it was virtually impossible for employees to obtain accurate information about the plan. For instance, the company did not provide a copy of the plan in its Nashville facility. Rather, employees were told to bring any questions regarding early retirement to trusted long-time benefits advisor Shirley Pike, who admittedly had never seen or read the plan documents. App. 4a-5a.

Unfortunately, Ms. Pike harbored a fundamental misunderstanding of the company's right to make future alterations to benefits afforded under the plan, as evidenced by her statements to at least two employees that the

1. For citation purposes, the petition for a writ of certiorari is referred to herein by the abbreviation "Pet." Materials included in the appendices to the petition are referred to by the abbreviation "App."

reservation of rights clause in the SPD was written for the benefit of Pirelli to enable the company to change insurance carriers. As Pike put it, "If I had that discussion, I am sure I would have talked about insurance carriers." App. 5a. Pike also admitted that she did not know whether she had the role of a fiduciary relating to the dissemination of information about the early retirement program to the company's employees because she was not sure what a "fiduciary" was. App. 5a. Moreover, Pirelli's General Counsel and Secretary, Sherwood Willard, acknowledged that it would have been prudent for Pike to have read the plan and to have had a copy of it in her office because she was responsible for providing accurate information to employees about its terms and conditions. App. 6a.

Petitioner's truncated statement of the facts also omits the testimony from each Respondent regarding his or her interactions with Pirelli representatives. This testimony conveys the background and context of the communications which are at issue in this case. The Sixth Circuit, recognizing that a determination as to whether a statement is inaccurate or misleading cannot be made apart from the context of the statement, included excerpts from all the Respondents' testimony in its overview of the material facts.[2] *See* App. 7a-12a. This testimony demonstrates that Respondents were seeking information regarding not only the current benefits

2. Petitioner complains that the Sixth Circuit did not remand this case to the trial court to make a finding on the specific contents of the language Pirelli's representatives used with Respondents. Pet. 14. However, Respondents' accounts of the content of their exchanges with Pirelli representatives regarding the OPS Program have never been a matter of dispute in this case. Indeed, the testimony of Respondents is in accord with the testimony of Ms. Pike as to the content of these interactions.

available to early retirees, but also the possibility of future changes in benefits, and that the issue of whether such changes were possible was addressed—inaccurately—by Pirelli's representatives. Indeed, Petitioner's assertion that none of the Respondents ever alleged or testified that a Pirelli representative told them that the ERISA Plan "could not" be changed is simply incorrect, as demonstrated by the following exchange between Pike and Respondent Ruby Panzera:

> Q: Did you ever ask Ms. Pike if the company could change your health insurance benefits after you retired?
>
> A: Well yes, we did discuss with her, you know, was this—"Is this a definite, you know, is this firm?" And she said, "Yes, it would not change as long as—you know, would remain this way until our death."

App. 9a; R. 137, Ruby Panzera, TR 4/26/99, Vol. I pp. 190-191, JA pp. 255-56.

Similarly, Respondent Paul Skelley testified that when Ms. Pike gave him a sheet summarizing the retirement program, he asked "if there was anything in small print anywhere else in any kind of contract that I lose any of this after I become 65?", to which Ms. Pike responded that he would have the coverage "until the day [he] die[d]." App. 9a. Respondent B.L. Cook testified that he asked Ms. Pike "what to expect" in the future regarding coverage, to which she responded that he would receive the stated medical benefits to "including the drug card, for as long as I live and if I died before my wife then she would receive those benefits as long as she lived providing she didn't remarry."

App. 10a; R. 137, Cook, TR 4/28/99, Vol. II, pp. 257-58, JA pp. 282-283.

Of course, it is hardly surprising that Ms. Pike inaccurately depicted future benefits as not being subject to change, since she herself was admittedly not aware that Pirelli had reserved the right to make such changes.

REASONS FOR DENYING THE PETITION

I. *Petitioner Has Merely Alleged Erroneous Findings Of Fact By the Sixth Circuit*

While the district court held that Pirelli did not make any misleading statements to Respondents, except in the instances where Ms. Pike responded inaccurately to direct questions about the meaning of the reservation of rights clause in the SPDs (App. 45a-46a), the Sixth Circuit disagreed. It found that Pirelli did provide materially false, inaccurate and misleading information regarding future benefits to all of the Respondents. App. 28a. This determination was necessarily based upon several factual conclusions pertaining to the information Respondents were seeking from Pirelli as well as the actual and perceived meaning and impact of the information conveyed by Pirelli's representatives. Indeed, the questions of whether or not Respondents were asking whether benefits "could" be changed, and whether or not they were told by Pirelli that benefits "could not" be changed—questions which Petitioner claims were wrongly decided by the Sixth Circuit—inarguably involve factual determinations.

It is not the preferred province of this Court to second-guess a lower court's findings of fact, or to reassess conclusions regarding the inferences to be drawn from these facts. *See* Supreme Court Rule 10(c). Any review of the Sixth Circuit's holding in this case would necessarily require such factual analysis. Therefore, the petition should be denied.

II. *The Sixth Circuit's Decision is Based Upon the Unique Facts and Circumstances of This Case And Is Not in Conflict With The Decisions of Other Courts of Appeal On The Issue Presented*

Undoubtedly, an employer or plan administrator has the right to alter or amend its welfare benefits plan notwithstanding prior accurate representations regarding current benefits under the plan. That right is not at issue in this case. However, contrary to Petitioner's suggestion, there is no authority in the Sixth Circuit or elsewhere holding that a reservation of rights provision in an SPD insulates an employer from its fiduciary duty, recognized by this Court[3], to provide complete and accurate information about future benefits under an ERISA Plan. Were it otherwise, as the Sixth Circuit correctly pointed out in this case, an employer or plan administrator could provide, on its own initiative, false or inaccurate information about the future benefits of a plan without breaching its fiduciary duty under ERISA. App. 25a. This would be contrary to the basic concept of a fiduciary duty, which "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the

3. This Court has held that "conveying information about the likely future of plan benefits [is] a discretionary act of plan administration" giving rise to a fiduciary duty. *Varity Corp. v. Howe*, 516 U.S. 489, 504, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996).

trustee knows that silence might be harmful." App. 25a. (citing *Krohn v. Huron Memorial Hospital*, 173 F.3d 542, 548 (6th Cir. 1999)).

A. The Sixth Circuit's Decision Is Fact-Specific

The question of whether an employer provided false or inaccurate information about the future benefits of an ERISA plan necessarily involves a fact-specific analysis. The particular facts and circumstances of each case, including the background leading up to the communications at issue and the context and nature of the exchanges between employer and employee, will determine whether a materially misleading representation has been made.

In this case, the Sixth Circuit appropriately engaged in a fact-specific analysis and determined that Pirelli misled the Respondents. Moreover, contrary to Petitioner's assertions, the material facts in this case consist of more than just Pirelli's use of the word "lifetime" to describe benefits under the Plan. Petitioner's attempt to strip away the factual nuances of the communications at issue in this case is understandable, as it cannot otherwise plausibly argue that this decision has any broad-based impact on this area of the law, or that it is in conflict with other decisions to which it bears only superficial factual resemblance. This Court should decline the request to review a fact-specific decision which in reality will have little impact other than, perhaps, with respect to cases involving the same sort of systemic and uniform dissemination of erroneous information and blatantly inaccurate responses to questions by an employer which is presented here.

B. The Decision Presented For Review is In Accord with Sixth Circuit Precedent

In assessing whether the opinion below contributes to a conflict of opinion on the issue presented, it must be noted that the Sixth Circuit engaged in an in-depth and thoughtful analysis of its prior decision in *Sprague v. General Motors Corp.*, 133 F.3d. 388 (6th Cir. 1998) (en banc)—which Pirelli claims represents the "other side" of the supposed conflict—as well as other cases addressing the issue of when employer's representations about plan benefits will constitute a breach of fiduciary duty. App. 15a-19a. Far from rejecting the principles articulated in these supposedly "conflicting" decisions, the Sixth Circuit in this case embraced and applied the analytical framework set forth in *Sprague* in conducting its analysis of the material facts. The Sixth Circuit acknowledged the factual similarities between S*prague* and this case, including the employer's use of the term "lifetime" in both cases to describe the nature of benefits. App. 16a. However, the Sixth Circuit ultimately concluded that the facts presented here are materially distinguishable from *Sprague*, a conclusion which is supported by a comparison of the context and content of the representations made in each case.

For instance, in *Sprague*, the plaintiffs' claims focused not on alleged oral (mis)representations, as in this case, but on written documents, namely plan summaries which informed early retirees that "their health insurance would be paid by GM for life." 133 F.3d at 395. Most of the plan summaries also "unambiguously reserved GM's right to amend or terminate the plan." *Id.* at 401. The plaintiffs' primary argument in *Sprague* was that the juxtaposition of these two statements in the same communication created an ambiguity. *Id.* However, neither the GM plan itself nor the

summaries "state[d] or ***even implie[d]*** that the plaintiffs' benefits were vested." (133 F.3d at 402) (emphasis added). Moreover, while "the company did not tell the early retirees at every possible opportunity *that which it had told them many times before*—namely, that the terms of the plan were subject to change," (133 F.3d at 405) (emphasis added) when individual employees asked about this issue "the answers given, it seems, were accurate—benefits could be changed in the future." *Id.* at 395. On the record before it, the Court in *Sprague* determined that GM's representation to early retirees could not "reasonably be deemed misleading." 133 F.3d at 406.

In this case, unlike in *Sprague*, there is undisputed evidence that the company appointed a plan representative who did not have access to plan documents and did not understand that the company had the right to alter future benefits. Moreover, there is no evidence in the record here, as there was in *Sprague*, that the company told employees "many times" that the terms of the plan were subject to change, or that the company gave accurate answers when asked whether benefits were subject to change. On the contrary, there is no record that Pirelli *ever* mentioned that it had the right to alter or amend benefits under the plan, in any of its group meetings or presentations to early retirees. It is undisputed that Pirelli repeatedly and unequivocally responded to questions posed about the possibility of changes in the plan by saying that such changes would not occur, despite the fact that Respondents were clearly seeking guidance about what could happen in the future.

The Sixth Circuit recognized that the nature of the exchange between Pirelli and Respondents in this case was fundamentally different from the communications at issue in *Sprague*, and that the unique facts of this case implicated

the scenario which *Sprague* had expressly envisioned when it held that "[h]ad an early retiree asked about the possibility of the plan changing, and had he received a misleading answer, or had GM on its own initiative provided misleading information about the future of the plan . . . a different case would have been presented." App. 18a-19a (citing *Sprague*, 133 F.3d at 404-405).

C. The Sixth Circuit's Decision is Not in Conflict With The Decisions of Other Courts of Appeals

Other cases which Pirelli has characterized as being in alignment with *Sprague* and therefore on the "other side" of the issue presented are also easily factually distinguished from this case. For instance, while it is true that, in *Frahm v. Equitable Life Assurance Soc. Of United States*, 137 F.3d 955 (7th Cir. 1998), the Seventh Circuit found no breach of fiduciary duty based upon statements by some plan representatives that benefits would be for a "lifetime", the court also found that the employer had taken adequate precautions to ensure that plan participants were given correct information, including training benefits staff to provide correct advice and providing accurate written descriptions of the employer's right to change the plan. *Id.* at pp. 959-960. Moreover, in *Frahm*, unlike in this case, incidents of potentially confusing oral advice to plan participants were depicted as isolated anomalies which occurred despite the company's precautions. *Id.* at 960 ("claims that one or another bit of advice was misleading do not violate the statute."). These facts stand in stark contrast to this case, where Pirelli uniformly provided misleading information to all employees through a representative who did not understand the ramifications of the reservation of rights clause and was not adequately trained to address these issues.

Other cases cited by Pirelli as being in conflict with the Sixth Circuit's decision in this case do not even address the same issue presented here. For instance, in *Wilson v. Southwestern Bell Tel. Comp.*, 55 F.3d 388 (8th Cir. 1995), employees asked the plan representatives a direct question about an existing fact—i.e., whether the company was planning any additional layoffs which would impact benefits under the Plan.[4] *Id.* at p. 404. The Court in *Wilson* found that the employer did not violate its fiduciary duty by responding that no additional layoffs would occur "if we do a good job growing our business," despite the fact that additional, previously uncontemplated layoffs did later occur. *Id.*

Pirelli's attempt to manufacture a conflict by comparing the holding in this case with the holdings in *Wilson* and other cases addressing the issue of whether an employer is obligated to disclose contemplated future changes in benefits to employees is unpersuasive. Unlike in *Wilson*, the employees in this case did not ask Ms. Pike whether benefits were going to be changed in the future. Rather, they were seeking a broader category of information, encompassing the *possibility* of future changes. Pirelli inaccurately conveyed to Respondents that such changes were not a possibility. This was an inaccurate statement pertaining to subject matter within Pirelli's then-current knowledge. Such a statement is exactly the type of representation which the court in *Sprague* opined would constitute a "different case" from an employer's "accurate representations of its current program." App. 19a (citing *Sprague*, 133 F.3d at 404-405).

---

4. The employees in *Wilson* asked questions such as "can we expect more management force reductions down the road?" *Id.* at p. 404.

D. The Sixth Circuit's Decision Is Based On Well-Established Principles of Fiduciary Duty

As stated, this case differs from the supposedly conflicting cases cited by Petitioner in that it involves repeated, ongoing interactions between company representatives and employees where the topic of possible changes in benefits was clearly "on the table." Indeed the evidence in the record undeniably shows that the issue of what could possibly happen to their benefits in the future was very much (and understandably) on the minds of the individuals considering early retirement. However, notwithstanding its knowledge of these concerns, Pirelli continued to issue misleading statements about the nature of these benefits, both on its own initiative and in response to questions specifically addressing whether benefits could be changed.

Petitioner relies on semantics, claiming that while it told employees the plan "would not" change, it never told employees that the plan "could not" change. Such distinctions are meaningless in the analysis of whether Pirelli fulfilled its fiduciary obligation not to mislead these individuals. For example, when Paul Skelley asked whether there was anything "in small print anywhere else" that could cause him to lose any of his benefits (J.A. at 268), it fell to Pirelli to give an accurate response. The true and accurate answer to Mr. Skelley's question, which was entirely within Pirelli's present knowledge, was "yes." Shirley Pike telling Mr. Skelley that he would have benefits until the day he died was *not* an accurate response to his question. It really is not that complicated—Mr. Skelley clearly wanted to know if his benefits could be changed and Pirelli falsely and inaccurately reassured him that this would not happen. Thus, Mr. Skelley concluded, entirely reasonably, that his benefits were indeed

"locked in" for life and not subject to change, and relied upon this conclusion in deciding to take early retirement. Of course, Mr. Skelley's confusion in this regard directly benefited Pirelli.

The failure on the part of Pirelli to provide accurate information to employees considering early retirement was systemic and applicable to all Respondents in this case, even those who were not able to articulate their concerns as well as Mr. Skelley, or the individuals who specifically asked and were misinformed about the meaning of the reservation of rights clause in the SPDs. To hold otherwise would be to find that a plan administrator's fiduciary duty runs only towards those individuals who are able to formulate the "magic words" to address their concerns, despite the fact that all beneficiaries are similarly at risk as a result of the plan administrator's misleading representations or omissions regarding benefits. Such a conclusion runs contrary to the well-established principle that a fiduciary has an affirmative duty to provide information where it knows that its failure to do so might cause harm. This concept was recognized by the Third Circuit Court of Appeals in *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litigation*, 57 F.3d 1255, 1264 (3d Cir. 1995) and appropriately applied by the Sixth Circuit to bring about the correct result in this case.

The Sixth Circuit's ruling in this case does not affect the ability of any employer to alter or amend a plan; nor does it undermine the *Sprague* Court's admonition that an employer's "failure to begin every communication to plan participants with a caveat" (133 F.3d at 405) is not a violation of its fiduciary duty under ERISA. Rather, the Sixth Circuit has simply followed the mandate set forth in *Sprague*, that a plan fiduciary may not mislead beneficiaries.

III. *Petitioner Alleges That The Sixth Circuit Misapplied A Properly Stated Rule Of Law*

Petitioner does not contend that the Sixth Court misstated any rule of law applicable to the fiduciary duty of ERISA plan administrators. Indeed, both Petitioner and Respondents agree that this duty is set forth in the ERISA statute (29 U.S.C. § 1104) and further defined in Supreme Court decisions such as *Varity*, as well as the Sixth Circuit's previous decision in *Sprague*. Petitioner simply contends that the Sixth Circuit incorrectly applied these rules in determining whether Pirelli's representations constituted a breach of its fiduciary duty. This Court has stated that will only rarely grant a petition for writ of certiorari based upon an alleged misapplication of a properly stated rule of law (*See* Supreme Court Rule 10(c)), and petitioner has failed to present any compelling reason why it should do so in this case.

IV. *The Sixth Circuit's Decision Does Not Undermine Congressional Policies Regarding ERISA*

Petitioner's arguments that the Sixth Circuit's decision somehow undermines the authority of written plan documents relies upon its mischaracterization of the holding and of the issues presented in this case. This case does not support the proposition that any oral representations of an employer may effectively amend an ERISA plan. Rather, the only general principle or rule of law which may be drawn from the Sixth Circuit's fact-specific holding is simply that an employer may not mislead employees by systematically and uniformly representing to them that the truth—in this case the truth about what could happen to plan benefits in the future—is something different than what is stated in the plan documents. A rule of law prohibiting fiduciaries from

misleading beneficiaries is neither controversial nor novel. Indeed, Petitioner's musings about what Congress intended with respect this issue ignores that body's codification of the fiduciary duty of ERISA plan administrators.

Petitioner's arguments that the Sixth Circuit's decision will "prompt a new cottage industry of litigation" involving swearing contests between employers and employees, thereby deterring employers from offering ERISA welfare benefits plan, is completely unsupported. Petitioner ignores the fact that the Third Circuit, in *Unysis*, issued a similar holding, based on similar facts, *over eight years ago*. Petitioner does not point to any empirical evidence demonstrating any increase in ERISA breach of fiduciary duty claims or decrease in ERISA welfare benefits plans during that time. Indeed, it seems doubtful that employers would forego offering benefits packages which permit them to effectively compete for employees, simply because they are required to communicate truthfully and accurately with employees regarding the nature of the benefits provided.

Similarly, Petitioner's argument that the "unpredictably" engendered by the supposed conflict of opinion on this issue will discourage employers from explaining welfare benefits programs to employees is unpersuasive, particularly in the context of early retirement incentive programs. Employers clearly will always have a self-interested motive to engage in communications with employees about such programs. To the extent the Sixth Circuit's decision has any impact beyond the parties to the case, it will, hopefully, encourage ERISA plan administrators involved in similar scenarios to answer benefits questions truthfully and to take steps to ensure that beneficiaries are not provided with inaccurate and misleading information regarding plan benefits. To the

extent this places a "burden" upon employers, it is, respectfully, a burden which is in accord with well-established law and which this Court should be most reluctant to disturb.

CONCLUSION

For all of these reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

HUGH C. HOWSER, JR.
Counsel of Record
KARA E. SHEA
MILLER & MARTIN LLP
Attorneys for Respondents
1200 Nashville Place
150 Fourth Avenue North
Nashville, TN 37219
(615) 244-9270